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WHY UKRAINE NEEDS AN INTERNATIONAL – NOT INTERNATIONALISED – TRIBUNAL TO PROSECUTE THE CRIMES OF AGGRESSION COMMITTED AGAINST IT

Abstract: Ukraine has called for the establishment of an *ad hoc* tribunal to investigate and prosecute crimes of aggression committed against it in the context of the Russian invasion. Ukraine has insisted that such a tribunal must be international in nature. Members of the G7, however, have stated that they can only support an 'internationalised' or hybrid tribunal. This article considers the critiques advanced against the international tribunal model and contends that many of these arguments are flawed, while arguments in favour of the internationalised model are misplaced or overstated. In addition to other advantages, it is demonstrated that an international tribunal: could be set up more quickly; would have a greater prospect of ensuring immunities do not apply; and would be more effective in reinforcing the prohibition of the use of force, thereby maximising the potential of deterrence. For these reasons, it is concluded that an international tribunal is the best option for ensuring that those most responsible for crimes of aggression committed against Ukraine are held to account.

Keywords: crime of aggression, use of force, Russia, Ukraine

Russia's invasion and ongoing use of force against Ukraine, and its purported annexation of Ukrainian territory, represent an archetypal example of a State act of aggression that, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.[1] This means that persons in a position effectively to exercise control over or to direct Russia's political or military action, who have been responsible for planning, preparing, initiating or executing those acts of aggression, have

1 For more detail, see McDougall, "The Imperative".

committed the crime of aggression.[2] In order to deliver a measure of justice to the Ukrainian people, and to reinforce the prohibition of the use of force, it is imperative that such persons be held to account.[3]

For this to happen, an *ad hoc* tribunal must be established. Due to Russia's ability to block any Security Council referral,[4] and the non-State Party carve out applicable to crimes of aggression in the case of a *proprio motu* investigation or State referral,[5] the International Criminal Court (ICC) lacks jurisdiction over any crimes of aggression committed by Russian (or Belorussian) nationals. While there are excellent reasons to seek to remove the unique restrictions on the ICC's aggression jurisdiction,[6] it is unrealistic to suggest that such amendments could be applied to the situation in Ukraine.[7] Any domestic prosecution is also likely to face significant challenges, including: a lack of jurisdiction outside of the aggressor and victim States; the applicability of immunities; an inability to secure the presence of the accused; the inevitable taint of victor's justice (or victim's revenge); and a lack of domestic expertise in the *jus ad bellum*.[8] For these reasons, it has been widely recognised that an *ad hoc* tribunal represents the only viable path to prosecution.[9]

The proposed establishment of such an *ad hoc* tribunal is inching towards reality, with numerous statements of political support,[10] the convening of a 'core group' of States to discuss key issues,[11] and the establishment of the International Centre for the Prosecution of the Crime

2 Article 8*bis*, Rome Statute.

3 For detailed arguments, see McDougall, "The Imperative". See also Nuridzhanian, "Justice for the Crime of Aggression Today".

4 Article 15*ter*, Rome Statute.

5 Article 15*bis* (5), Rome Statute.

6 See in this regard model amendments proposed by the Global Institute for the Prevention of Aggression, which the author drafted in consultation with other aggression experts on behalf of the Institute: https://crimeofaggression.info/gipa-proposal-to-amend-art-15bis/.

7 McDougall, "The Imperative"; McDougall, *The Crime of Aggression*, 258-352; Reisinger Coracini, "Is Amending the Rome Statute the Panacea".

8 See detailed explanations set out in McDougall, "The Imperative".

9 See, for example, Sands, "Putin's Use of Military Force"; Trahan, "UN General Assembly"; Hathaway, "A Crime in Search of a Court"; Dannenbaum, "A Special Tribunal", 859-873; Korynevych and Korotkyi, "The Special Tribunal", 33-42; Kreß, Hobe and Nußberger, "The Ukraine War"; Albania et al, "Frequently Asked Questions".

10 See footnotes 100-104 in McDougall, "The Imperative".

11 Zelensky, "Statement to the online summit of Core Group leaders"; Core Group Joint Statement.

of Aggression Against Ukraine in The Hague to secure evidence and start building case files.[12]

Increasingly, discussions among supportive States have focused on the type of tribunal that should be established. Ukraine has called for a tribunal that is international in nature.[13] Such a tribunal could theoretically be established by treaty.[14] States supporting an international tribunal have, however, at least for now, coalesced around the proposal that the tribunal be established through an agreement concluded between Ukraine and the United Nations, approved by the General Assembly (GA),[15] such that this model shall be taken to represent the 'international' option for the purpose of this article. In contrast, the G7 (Canada, France, Germany, Italy, Japan, the UK and the US), has championed an 'internationalised' tribunal[16] (traditionally described as a hybrid), which would formally be part of the Ukrainian legal system – or part of the legal system of a third State or States to which Ukraine would transfer territorial jurisdiction[17] – but have some international elements.

This article explores the merits of these two alternative models, and argues that States need to back the 'international' option in order to maximise the prospect of those responsible for crimes of aggression committed against Ukraine being held to account.

1. The Case for an 'Internationalised' Tribunal

The exact shape of the 'internationalised' tribunal being proposed by the G7 is unclear. The US originally said that it envisaged the tribunal being 'deeply embedded'[18] in the Ukrainian national system but with 'significant international elements – in the form of substantive law, personnel,

12 Eurojust, "History in the Making".

13 See for example, Zelensky, Speech to representatives of the public, political and expert circles. Interestingly, in the *Brussels Declaration*, a group of Russian experts have also called for an international tribunal.

14 As to the requirements of such a tribunal see McDougall, "The Imperative".

15 See ibidem; Johnson, "United Nations Response Options".

16 G7 Japan 2023 Foreign Ministers' Communique. The statement was also issued in the name of the High Representative of the European Union. See also "German Foreign Minister Backs Special Ukraine Tribunal", "UK Joins Core Group" and Van Schaack, "Remarks on the US Proposal".

17 President of Ukraine "Special international tribunal".

18 Van Schaack, Online Press Briefing.

information sources, and structure.'[19] The US has also referred to the need for international support in the form of funding, technical and capacity-building and diplomacy;[20] and it has suggested that the tribunal be 'located elsewhere in Europe, at least at first…'. As negotiations have unfolded,[21] it has been alternatively suggested that a hybrid tribunal be established in the jurisdiction of a third State or States,[22] to which Ukraine would transfer its territorial jurisdiction (as it did in the context of the prosecution of crimes arising from the downing of Malaysia Airlines flight MH17).[23]

Only sparse arguments in favour of the internationalised model have made their way to the public record – with most comments made by the US. It has stated that an internationalised model 'will provide the clearest path to establishing a new Tribunal and maximizing our chances of achieving meaningful accountability.'[24] Expanding on this view, US Ambassador-at-Large for Global Criminal Justice, Beth Van Schaack, has queried whether the GA has the power to establish a tribunal,[25] and expressed doubt as to whether the GA would 'wholeheartedly' support an international tribunal's establishment[26] – based in part on the fact that the number of States voting in favour of GA resolutions taking concrete action against Russia have been considerably lower than the number voting in favour of resolutions restricted to the condemnation of Russia's actions.[27]

A linked concern appears to relate to the powers that a GA-backed international tribunal would enjoy. In Van Schaack's words:

> …the General Assembly, under the UN Charter system, has the ability only to make recommendations… it does not have coercive powers… So it would be dependent upon voluntary contributions and cooperation of states. And so it's hard to square that with a criminal process that might be going forward against an individual whose state has not consented to this, and an individual who will be entitled to challenge the grounds on which he might be taken

19 Van Schaack, "Remarks on the US Proposal".
20 Van Schaack, Online Press Briefing; Van Schaack, "Opening Statement".
21 Van Schaack, "Remarks on the US Proposal". The US foresees the tribunal being transferred to Ukraine "when the security conditions allow": Van Schaack, Online Press Briefing.
22 See note 18.
23 Agreement between the Kingdom of the Netherlands and Ukraine.
24 Van Schaack, "Remarks on the US Proposal".
25 Van Schaack, interview with Nick Schifrin.
26 Ibidem.
27 Van Schaack, Online Press Briefing.

into custody. And could the General Assembly take someone into custody, essentially, and impose a sentence on that person?[28]

Immunities has emerged as another key consideration. State proponents of an internationalised tribunal have claimed that individuals enjoying personal immunity (at least the head of state, head of government and foreign minister) would be able to rely on those immunities for the duration of their term in office, regardless of whether the tribunal was international or hybrid. At the same time, they have asserted that functional immunities would not apply to a prosecution for the crime of aggression, regardless of the tribunal model employed.[29]

Finally, the US has argued that, unlike an international tribunal, an internationalised tribunal 'has the ability to be set up quickly, to be nimble, to be able to be established immediately because there's an existing legal framework',[30] and it has asserted that an internationalised tribunal would have 'the benefit of continuing to build and support the Ukrainian national legal system.'[31]

In the opinion of this author, a number of the critiques levelled against the international tribunal model are flawed, while the arguments in favour of an internationalised tribunal are either misplaced or overstated, as explained below.

2. Establishment

The first argument in favour of an internationalised tribunal outlined above related to the GA's ability to establish an international criminal tribunal. While some scholars have advanced creative arguments contending that the GA has the power to establish a criminal tribunal,[32] such scholars present virtually no evidence that this interpretation of the GA's powers is supported by anything approaching a majority of States. In fact, all evidence

28 Ibidem.

29 See, for example, Statement of Annalena Baerbock, German Foreign Minister at the Ministerial Side-Event on the Occasion of the 25th Anniversary of the Rome Statute.

30 Ibidem.

31 Ibidem.

32 Barber, *The Powers of the UN General Assembly*; Stahn, "From 'United for Peace'", 251-286.

based on GA practice in the criminal justice sphere points to the contrary.[33] Nevertheless, this issue is moot in the current context, as Ukraine has not suggested that the GA establish an international tribunal. Rather, it has been proposed that the GA request the Secretary-General to negotiate an agreement to be concluded between Ukraine and the UN, and that the GA approve the agreement.

The fact that the GA itself lacks judicial power is not a barrier to the adoption of a resolution concerning the establishment of a tribunal with the power to make binding decisions. This was confirmed by the International Court of Justice (ICJ) in its *Effect of Awards* opinion where it held that in establishing the United Nations Administrative Tribunal (UNAT) the GA 'was not delegating the performance of its own functions: it was exercising a power which it had under the Charter to regulate staff relations.'[34] Just as the establishment of UNAT fell within the scope of the Assembly's powers to regulate staff relations, the adoption of the proposed resolutions would fall within the scope of Articles 10, 11(2) and 14 of the Charter, which empower the GA to make recommendations in relation to matters within the scope of the Charter generally, and in relation to the maintenance of international peace and security, and the peaceful adjustment of any situation, specifically. These powers are broad, and their scope is determined by the GA itself.[35] That the establishment of an international criminal tribunal is a measure that can properly be characterised as contributing to the maintenance of international peace and security is, however, confirmed by the decision of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* jurisdiction case.[36]

33 The author was previously an Australian Government lawyer and legal adviser at Australia's Mission to the United Nations and in these capacities was involved in negotiations on the proposed establishment of a tribunal to prosecute crimes associated with the downing of flight MH17 and the establishment of the International, Impartial and Independent Mechanism for Syria, among other things. On the basis of personal engagement with Member States on the powers of the GA to establish criminal justice mechanisms, my assessment is that the prevailing view among States is that the GA lacks the power to establish a tribunal with prosecutorial and judgment powers, absent the consent of a State with jurisdiction over relevant crimes.

34 *Effect of awards of compensation made by the U.N. Administrative Tribunal*, Advisory Opinion, ICJ opinion of 13 July 1954, I.C.J. Reports 1954, para. 61.

35 As to the proper interpretation of these provisions, see the commentary to Articles 10, 11(2) and 14 in Simma et al, *The Charter of the United Nations*.

36 *Prosecutor v Duško Tadić*, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY decision of 2 October 1995, para. 38.

Consistent with the ICJ's *Certain Expenses* opinion, the GA lacks the power to create criminal jurisdiction where it does not exist, or to compel States to cooperate with an international tribunal, because this would amount to enforcement action – a power enjoyed exclusively by the Security Council.[37] In the current context, however, there is no need for such powers to be exercised.

In the first place, the tribunal would be established with Ukraine's consent and would be delegated its territorial jurisdiction[38] (or arguably enjoy inherent jurisdiction over crimes under customary international law).[39]

Ukraine's ability to provide the necessary consent is based on the jurisdiction it enjoys over the crimes in question. As the crime of aggression is understood to be committed on the territory of both the aggressor and victim State,[40] Ukraine has jurisdiction over foreign nationals accused of having committed the crime of aggression on its territory without the consent of the State of nationality of alleged perpetrators, consistent with the wellestablished operation of the territorial principle of criminal jurisdiction under international law.

While the International Law Commission (ILC) at one stage suggested that foreign State adjudication of crimes of aggression would violate the *par in parem imperium non habet* principle, because prosecution would require the establishment of an act of aggression by a State,[41] the Commission cited no authority for this view and identified no State practice in support of it. I am of the view that the ILC's position is also conceptually flawed.

37 *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)* Advisory Opinion, ICJ opinion of 20 July 1962, I.C.J. Reports 1962, paras 165, 171, 176-177.

38 It is now well established that a State with jurisdiction over a crime can delegate adjudication and enforcement jurisdiction to another State or to an international tribunal. It is, for example, widely accepted that the delegation of jurisdiction by States Parties is the legal basis for the exercise of the ICC's jurisdiction in the case of a State referral or proprio motu investigation: see for example *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar* (ICC-01/19), ICC Pre-Trial Chamber III, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/ Republic of the Union of Myanmar of 14 November 2019, para. 60.

39 *Prosecutor v Gbao* (Case No. SCSL-2004-15-AR72(3)) SCSL Appeals Chamber, Decision on the Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court of 25 May 2004, para. 6.

40 Special Working Group on the Crime of Aggression, February 2009 Report, paras 38-39 and November 2008 Report, paras 28-29.

41 International Law Commission, Draft Code of Crimes, para. 14 of commentary to draft Article 8.

In determining individual criminal responsibility for a crime of aggression, a national court does not make any decision that would affect the rights or obligations of a foreign State, or otherwise have any direct legal consequences for it. National courts also routinely identify foreign State violations of international law in adjudicating other serious international crimes and it is not claimed that such proceedings violate the *par in parem imperium non habet* principle.[42] This is supported by State practice, whereby China,[43] Poland[44] and Ukraine[45] have exercised jurisdiction over crimes against peace or the crime of aggression committed against them by foreign nationals, and the fact that the overwhelming majority of the 74 States that have criminalised aggression domestically assert jurisdiction where they have been the victim State, regardless of the nationality of the perpetrator.[46] In effect, this means that Ukrainian consent is sufficient and Russian consent to the establishment of the tribunal is not required.

It is true that third States could not be compelled to cooperate with an international tribunal established by an agreement concluded between the UN and Ukraine – but this is not a necessary prerequisite.[47] States could be encouraged to cooperate by the GA, and supportive States could conclude instruments with the tribunal to set out the terms of their cooperation. In light of the overwhelming effort to support accountability for crimes being committed in Ukraine, one might reasonably conclude that States would not be slow to provide such cooperation. It is also noted that even where States are under a binding obligation to cooperate with a tribunal, such support has not always been forthcoming.

Support for the proposed approach is found in the Special Court of Sierra Leone (SCSL) and Extraordinary Chambers of the Courts of Cambodia (ECCC) precedents. The SCSL was established as a result of an agreement concluded between Sierra Leone and the UN, and its competence extended to foreign nationals who committed crimes on Sierra Leone's territory.[48] The Agreement establishing the SCSL was negotiated as a result of Security Council Resolution

42 See further Wrange, "The Crime of Aggression", 704-751.

43 Trial of Takashi Sakai.

44 Trial of Gauleiter Artur Greiser.

45 *Alexandrov and Yerofeyev* (752/15787/15-k), Judgment, Golosyyvsky District Court, Kyiv, 18 April 2016.

46 See McDougall, *The Crime of Aggression*, 173-183, 194-200.

47 Of the *ad hoc* tribunals established to date, third States were only legally required to cooperate with the ICTY and the ICTR.

48 Article 1(1), *Agreement between the United Nations and the Government of Sierra Leone*.

1315 (2000), which requested the Secretary-General to negotiate an agreement with Sierra Leone. Importantly, however, Resolution 1315 itself did not establish the Court, nor did the Council act under Chapter VII of the Charter. Thus, there is no basis to suggest that the Council's coercive powers were essential to the legal validity of the Court's establishment, or the Court's exercise of jurisdiction over foreign nationals. The ECCC was ultimately established by Cambodian law.[49] The international components of the ECCC, and UN support for it, however, are regulated by an Agreement concluded between Cambodia and the UN,[50] negotiated by the Secretary-General at the GA's request,[51] and approved by the Assembly.[52] The combination of these two examples thus provides a good precedent for the establishment of the proposed international tribunal.[53]

In contrast, the establishment of an internationalised tribunal in at least Ukraine would be complex. As detailed by others,[54] the establishment of a hybrid tribunal would require the amendment of Articles 125 and 127 of the Constitution of Ukraine. Ukraine's Constitution cannot be amended while martial law is in place, and there is no prospect of martial law being lifted before the end of Russia's aggression.[55] Even assuming the *Rada* eventually agreed to such amendments, this would mean a significant delay in the establishment of a tribunal, which could have consequences for the collection of evidence, and would fail to capitalise on the deterrent effect of an active tribunal.[56]

49 *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia*.

50 Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 6 June 2003.

51 GA Resolution A/RES/57/228 (2002).

52 GA Resolution A/RES/57/228B (2003).

53 See further, in particular, Corell, "A Special Tribunal for Ukraine".

54 See for example Komarov and Hathaway, "Ukraine's Constitutional Constraints".

55 Remarks of Andriy Smyrnov at the International Conference on the Special Tribunal.

56 The notion that international criminal justice has the ability to deter crimes is contested, but it can be argued that criminal prosecutions for aggression are comparatively more likely to have a deterrent effect given that most States' foreign and security policy is based on a rational risk-based assessment: see McDougall, *The Crime of Aggression*, 58-60. In relation to the point that the issuing of the ICC's arrest warrant against President Putin for the war crimes of unlawful deportation of population and unlawful transfer of population is no substitute for the crime of aggression see McDougall, "The Imperative of Prosecuting", 226-227.

3. The Existence of the Necessary Political Will

As noted above, the G7 has expressed concern that an attempt to secure support for the necessary GA resolutions could attract a significant number of no votes and abstentions.[57] While sceptics have not gone so far as to suggest that the resolutions could fail to be adopted, the fear has been expressed than an underwhelming result would undermine the tribunal's legitimacy.

I am on the record as saying that securing the requisite level of support for a GA-backed tribunal will be difficult given the controversy that will inevitably attach (in the eyes of some) to any attempt to prosecute the leaders of a State without that State's consent (regardless of the fact this is lawful) - especially for the crime of aggression, which has a history of being particularly contentious. I also noted that the question of whether it will in fact be possible to secure the necessary support would only be revealed by the fate of a draft resolution that was first circulated in New York in late 2022.[58]

I remain of this view, but would make four additional points. First, the passage of time since the initial circulation of the resolution should not be taken to indicate a lack of support. In my personal experience as a diplomat posted to the UN, I can testify to the fact that it is very common for complex resolutions to have long incubation periods while details are worked out and ducks are lined up.

Second, there has not yet been a concerted diplomatic campaign to secure support, not least because some of Ukraine's closest partners are yet to be convinced of the merits of an international as opposed to internationalised tribunal. This point has been made by representatives of States leading the diplomatic negotiations, who have observed that they have encountered questions from colleagues in New York, but no real resistance to the proposal.[59]

Third, it is false to suggest that, if a resolution relating to an aggression tribunal fails to garner close to the number of affirmative votes attracted by texts condemning Russia's aggression (140+), the tribunal would lack legitimacy. Generally speaking, in UN circles a resolution attracting more than 100 votes on a divisive issue is seen as a strong outcome. This is demonstrated by the fact that the International, Impartial and Independent Mechanism for

57 See also International Crisis Group, *A New Court*.
58 McDougall, "The Imperative".
59 Tammsaar, "An International Special Tribunal".

Syria (IIIM) (now a fixture in the international justice architecture, funded through the UN regular budget) was established with 105 in favour, 15 against, and 52 abstentions – figures that today are consigned to history and not used to question the IIIM's legitimacy. The adoption of a resolution with only 80-90 votes may be considered a little weaker, but, ultimately, the tribunal's legitimacy would be determined by its track record, not the GA vote.[60]

Finally, proponents of an internationalised model have indicated that it would be useful to secure a GA resolution expressing support for that tribunal. There is no basis to suggest that such a resolution would enjoy materially broader support. The only major variable is the position of the G7 itself: the G7 argument that the expected lack of GA support is a reason to support an internationalised tribunal over an international one is thus unconvincing because it largely depends on the G7's own voting position and is, as a result, circular. This in turn undermines the G7's arguments about the relationship between a GA vote outcome and the legitimacy of a tribunal.

4. The (In)Applicability of Immunities

Significant ink has been spilt on the relevance of immunities to the choice of tribunal model. In good company,[61] I have argued[62] that while some States and scholars maintain a different view, it is difficult to ignore the fact that there is now a line of jurisprudence holding that immunities do not apply to a criminal prosecution before an international tribunal.[63] While this is

60 It is assumed that a two-thirds majority of Members present and voting would be required under Article 18(2) of the Charter in light of the fact that the resolution would amount to a recommendation with respect to the maintenance of international peace and security. Rule 86 of the GA's Rules of Procedure specify that "Members present and voting" includes only Members casting an affirmative or negative vote. Those abstaining are considered as not voting. On the basis of past practice, it can be expected that the resolution would attract more abstentions that no votes. As such, a vote of 80-90 in favour would be more than adequate to pass the resolution.

61 See, for example, Trahan and Reisinger-Coracini, "The Case for Creating a Special Tribunal"; Open Society Justice Initiative and International Renaissance Foundation, *Immunities and Special Tribunal*; Hamilton, "Ukraine's Push to Prosecute Aggression", 47-53; cf. Advisory Committee on Public International Law, *Challenges in Prosecuting the Crime of Aggression*, 7-9.

62 McDougall, "The Imperative".

63 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, ICJ Judgment of 14 February 2002, I.C.J. Reports 2002, para. 61; *Prosecutor v Furundzija* (IT-95-17/1-T), ICTY Trial Chamber, Judgment of 10 December 1998, para. 140; *Prosecutor v Milosevic* (IT-02-54), ICTY Trial Chamber, Decision on Preliminary Motions of 8 November 2001, paras 28-34; *Prosecutor v Taylor* (SCSL-2003-10-I), SCSL Appeals Chamber, Decision on Immunity from Jurisdiction of 31 May 2004,

ultimately a question that will have to be determined by the tribunal itself, there is a sound basis on which to assert that the prospect of immunities being held to be inapplicable is significantly greater in the event that the tribunal is properly characterised as international.

Kevin Heller has argued that

> '[a] hybrid tribunal created by a UN/Ukraine agreement at the behest of the General Assembly would no less "act on behalf of the international community" than [an international tribunal] created by a UN/Ukraine agreement at the behest of the General Assembly.'[64]

He further asserts that such a tribunal would meet the definition of an 'international tribunal' set forth in the Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmanski and Bossa in the *ICC Jordan/Al Bashir* case, where their Honours defined an international tribunal as:

> an adjudicatory body that exercises jurisdiction at the behest of two or more states. Its jurisdiction may be conferred in one of a variety of ways: such as by treaty; by instrument of promulgation, referral or adhesion made by an international body or functionary empowered to do so; or, indeed, by adhesion or referral through an arbitral clause in a treaty. A court that operates physically or in principle within a domestic realm exercises international jurisdiction where such jurisdiction results in any manner described above.[65]

According to Heller, 'the final sentence makes it clear that a hybrid tribunal could be international even if it was part of Ukraine's judicial system.'[66] In this vein he argues that the SCSL and ECCC were both 'international tribunals' because each was created by a bilateral agreement concluded with the UN. According to Heller, the 'only difference between the two tribunals is that the UN and Cambodia mutually agreed to create the ECCC within Cambodia's judicial system while the UN and Sierra Leone

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para. 54; *Prosecutor v Al-Bashir* (ICC-02/05-01/09 OA2), ICC Appeals Chamber, Decision of 6 May 2019, para. 113. See also Principle III of the *Principles of International Law Recognised in the Charter of the Nürnberg Tribunal*.

64 Heller, "The Jordan Appeal".

65 *Prosecutor v Al-Bashir* (ICC-02/05-01/09 OA2), ICC Appeals Chamber, Decision of 6 May 2019, Annex I, Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmanski and Bossa, para. 56.

66 Heller, "The Jordan Appeal".

mutually agreed to create the SCSL outside of Sierra Leone's judicial system.'[67] In Heller's view, 'what matters is international support for a tribunal, not formal criteria such as whether it is created within or outside a state's judicial system – a decision that is itself purely political, not legal.' [68]

Heller has contended that ECCC jurisprudence confirms his view[69] – but this is inaccurate. In the decisions cited by Heller, the ECCC describes itself as an 'internationalised' court, not an international one.[70] Heller's further assertion that the Special Tribunal for Lebanon (STL) found that 'courts and tribunals that are set up through agreements between States and the United Nations, are courts of an international and not of a simply domestic nature'[71] is equally inaccurate. In the passage quoted by Heller, the STL was not defining an international tribunal (and certainly not defining an international tribunal for the purposes of the immunity question). Rather, it was considering the STL's 'kompetenz-kompetenz' jurisdiction and in this context simply held that regardless of the means of establishment, courts on the international level' were not part of a hierarchical court system.[72]

Heller's reasoning is equally flawed. In the first place, it is not clear that the jurisdiction of the proposed hybrid tribunal would be conferred by treaty or by an 'instrument of promulgation, referral or adhesion made by an international body or functionary empowered to do so', meaning that it would not meet the definition of an international tribunal offered by the Joint Concurring Opinion in the *ICC Jordan/Al Bashir* case. In the first place, the precise legal method by which any hybrid tribunal would be established is not yet clear: the ECCC was technically established by Cambodian legislation, and it is conceivable that this model could be replicated in Ukraine or a third State. A hybrid tribunal established as part of the Ukrainian domestic legal system would, moreover, exercise Ukraine's own territorial jurisdiction, such that its jurisdiction would not be 'conferred' by any instrument as such. A hybrid tribunal established in the domestic jurisdiction of a third State

67 Heller, "Jennifer Trahan's Cambodia Problem".

68 Ibidem.

69 Ibidem.

70 *Public Decision on Ieng Sary's Appeal Against the Closing Order*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC75), ECCC Pre-Trial Chamber, Decision of 11 April 2011, para. 222; *Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav Alisa "Duch"*, Case No. 001/18-07-2007-ECCC-OCIJ(PTC01), ECCC Pre-Trial Chamber, Decision of 3 December 2007, para. 19.

71 Heller, "Jennifer Trahan's Cambodia Problem".

72 *Decision on Appeal of Pre-Trial Judge's Orders Regarding Jurisdiction and Standing*, Case No. CH/AC/2010/02, STL Appeals Chamber, Decision of 10 November 2010, para. 41.

would rely on a transfer of Ukrainian territorial jurisdiction under a treaty level instrument – but it is not clear that this is the type of jurisdictional conferral that the Joint Concurring Opinion had in mind.

It must also be observed that the Joint Concurring Opinion's definition of an international tribunal is problematically vague, and the idea that a tribunal established by two States acting alone could meet the definition has attracted extensive criticism – including from among those who accept the Court's conclusion in relation to the inapplicability of immunities before international courts.[73]

More detail as to the meaning of a qualifying international tribunal can be found in the SCSL's decision in the *Taylor* case. As noted above, the SCSL was established by an agreement concluded between the UN and Sierra Leone, negotiated by the Secretary-General at the request of the Security Council (without reference to its Chapter VII powers). While the SCSL emphasised that the Council had the power under the UN Charter to initiate the establishment of an agreement,[74] and that the Agreement in question was made on behalf of all Member States and was therefore an expression of the will of the international community,[75] there is nothing in the decision to suggest that the Council's role was determinative. Indeed, the "inescapable" conclusion that the SCSL was an international court before which immunities did not apply was, according to the SCSL, premised on 'indicia too numerous to enumerate' contained in the constitutive instruments of the Court.[76] Identified as being of particular significance was the fact that:

1. The Special Court is not part of the judiciary of Sierra Leone and it is not a national court.
2. The Special Court is established by treaty and has the characteristics associated with classical international organisations (including legal personality; the capacity to enter into agreements with other international persons governed by international law; privileges and immunities; and an autonomous will distinct from that of its members).

The competence and jurisdiction *ratione materiae* and *ratione personae* are broadly similar to that of the ICTY and the ICTR and the ICC, including in

73 See for example Kreß, *Preliminary Observations*, 15-20.
74 *Taylor* case [37].
75 Ibidem [38].
76 Ibidem [42].

relation to the provisions confirming the absence of entitlement of any person to claim of immunity.[77]

On this basis, it is very difficult to defend the proposition that an internationalised court 'embedded' in a domestic legal system would qualify as an international tribunal before which immunities would not apply.

Proponents of an internationalised tribunal have separately expressed the view that immunity *ratione materiae* would be inapplicable before either an international or internationalised tribunal, meaning that persons other than President Putin, Prime Minister Mishustin and Foreign Minister Lavrov who meet the leadership qualifier built into the definition of the crime of aggression under Article 8*bis*(1), could be prosecuted immediately, and that any of the 'troika' could be prosecuted after they have left office. In this context, Heller has argued that the issue of personal immunities is moot (except insofar as the proposed tribunal may be empowered to conduct trials *in absentia*):

> ...because the likelihood of personal immunity ever being an issue in an actual trial is effectively zero. For a tribunal's ability to disregard personal immunity to matter, Putin must not only be captured, he must be captured while still holding office.[78]

Two points must be made in response. First, the applicable law is not so clear. Immunity *ratione materiae* provides all State officials with indefinite immunity before foreign domestic courts in respect of acts carried out in their official capacity. While Article 7 of the ILC's *Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction* enable one to contend that there is a customary law exception for serious international crimes,[79] the crime of aggression is not included in the ILC's list of crimes in respect of which functional immunity is inapplicable.[80] It is also important to recognise that the ILC was divided over this issue. A number of members disagreed with the exclusion of the crime of aggression.[81] Other ILC members, however,

77 Ibidem [41].
78 Heller, "The Need for Pragmatism".
79 International Law Commission, *Draft Articles on Immunity of State Officials*, 190-191.
80 Ibidem.
81 International Law Commission, *Report of the International Law Commission*, para. 122.

opposed Article 7 as a whole when, unusually, the Article was put to a vote.[82] ILC records clearly indicate that the Commission accepted that State practice was mixed, and all indications are that Commission members accepted that Article 7 represents the progressive development of international law, not existing customary international law.[83] To date, State comments on Article 7 have also been mixed. As such, while it is arguable – it is not clear that, as a matter of existing customary international law, functional immunity is inapplicable.

As explained above, the proposed hybrid tribunal would be part of the domestic system of its host State and would not be an international tribunal. As such, there is a good argument that it would need to respect immunities applicable before foreign domestic courts. It would be expected, and indeed imperative from a legitimacy point of view, that the judges of any tribunal would scrupulously respect the rights of an accused person. As such, there is a real possibility that a hybrid tribunal could be found to be unable to exercise jurisdiction over any State official for crimes of aggression committed as part of a State-sanctioned policy – effectively ruling out *any* prosecution by an internationalised tribunal.

Second, in line with the ICJ's decision in the *Arrest Warrant* case, not only would the tribunal be prevented from arresting President Putin (or other personal immunity holder) while in office, it would be prevented from even issuing an arrest warrant against him.[84] This would significantly detract from the expressive value of the tribunal (for States, Ukrainian victims and the Russian population),[85] its ability to deter further aggression by Russia and others,[86] and to isolate Putin.[87]

A related argument in favour of the international model relates to extradition. Article 61(1) of the Constitution of the Russian Federation provides that '[a] citizen of the Russian Federation may not be deported from Russia or extradited to another State'. A mirror provision is found in

82 Ibidem, para. 74.
83 Ibidem, paras 78, 83, 84.
84 *Arrest Warrant case*, para. 78(2).
85 See for example: Stahn, *Justice as Message*; Kreß, "An Arrest Warrant".
86 See note 58.
87 As to the ability of a criminal prosecution to neutralise Putin see: McDougall, "The Imperative", 210-211. As to the need to avoid falling into the trap of appeasing Russia generally, see for example: Dickinson, "Premature Peace"; International Crisis Group, *Answering Four Hard Questions*; Stanovya, "What the West"; Hamilton, "Do Not Delay". For an opposing view see Finucane and Pomper, "Can Ukraine Get Justice".

Article 25(2) of the Ukraine Constitution. The Ukrainian provision has been interpreted as being inapplicable to the transfer of a citizen to an international tribunal.[88] While it is possible that the Russian Constitutional Court or other body might adopt a contrary interpretation, based on the Ukrainian precedent, the establishment of an international, as distinct from hybrid, tribunal, would maximise the prospect of Russian nationals being able to be transferred to the proposed tribunal in the event of any future Russian cooperation (perhaps in a post-conflict effort to rehabilitate its international reputation, or cooperation secured as part of a peace agreement).

3. Efficiencies

While proponents of an internationalised tribunal have suggested that the model represents a quicker and cheaper option, this claim is unsubstantiated. The delay that would be occasioned by the need to amend Ukraine's Constitution to establish a hybrid tribunal demonstrates the fact that an internationalised tribunal, at least if established within the Ukrainian legal system, could not be established quickly.

There is also no compelling evidence that a hybrid tribunal would be more cost effective. Given it appears to be uncontroversial that either model would need to be located outside of Ukraine, that its establishment and operations should be staged, and that, if at all possible, it should make use of an existing tribunal's premises, it is not obvious that a hybrid tribunal would be significantly less expensive than an international tribunal.[89] An international tribunal established by an agreement concluded between Ukraine and the UN could, moreover, conceivably be funded through the UN regular budget, which would enable the cost of the tribunal to be spread among all Member States, which would also provide the most sustainable funding model.[90] Given the significance of the crimes in question and

88 This advice was provided to the author by Ukrainian Government officials in the context of work done in relation to the prosecution of persons responsible for the downing of flight MH17.

89 Comments of Aarif Abraham and Alex Whiting, *Criminal Responsibility for the Aggression Against Ukraine*; Abraham and McDougall, "Why a Special Tribunal". Certain costs estimates provided by international criminal justice experts (such as an initial first year cost of $US 25 million estimated by Global Accountability Network, *Considerations*, 36) do not take these cost savings measures into account and should thus be seen as exaggerated.

90 In this regard, it is noted that when the IIIM for Syria was established by the General Assembly in 2016 it was initially determined that the Mechanism would be funded through

the money otherwise being spent to support Ukraine, one might also question whether cost should be a determinative factor in model choice.

4. A Lack of Rationale

To date, hybrid tribunals have been created in circumstances where it was considered necessary to create a domestic mechanism to support the work of an international tribunal, or where there were clear arguments in favour of local ownership. These rationales are absent in the current context.

Ukraine has expressed a clear preference for an international tribunal primarily for reasons of efficacy, but also because an important element of the justice to be delivered is an acknowledgement that Ukraine is defending the international rules-based order on behalf of all States. As former UN Secretary-General Ban Ki Moon has argued, '[an] international tribunal would deliver on the shared responsibility of all UN member states to tackle impunity and defend the essence of the UN Charter.'[91]

Similarly, any judgment issued by the tribunal needs to be unambiguously delivered on behalf of the international community in order to meet its full potential to reinforce the prohibition of the use of force and to have a deterrent effect. A tribunal that is part of Ukraine's domestic legal system (or the legal system of an ally), albeit supported in some way by a General Assembly resolution and with some international judges and staff, is unlikely to enjoy the same legitimacy, and thus authority, as an international tribunal.[92] This reflects a general assessment of the shortcomings of the hybrid tribunals established to date compared to their international counterparts.[93] Perhaps more critically, however, a hybrid tribunal responsible for adjudicating the criminal responsibility of those responsible for a State act of aggression is, in my assessment, considerably more likely to be vulnerable to criticisms of bias, particularly if located in the judicial system of the victim State, or one of the victim State's key supporters. A hybrid tribunal would

voluntary contributions, but in late 2019, the Assembly agreed to include the Mechanism in the UN's regular budget.

91 Ki-Moon, "The Path to International Tribunal".

92 On the relationship between legitimacy and authority, or compliance pull, see Franck, *The Power of Legitimacy*; Shany, *Assessing the Effectiveness*.

93 See, for example, McAuliffe, "Hybrid Tribunals"; McCauliffe, "Hybrid Courts"; Mendez, "The New Wave"; Gidley, *Illiberal Transitional Justice*; Bassiouni, "Post-Conflict Justice".

therefore be more likely to be subject to critiques relating to a lack of impartiality and independence, such that its judgments are unlikely to be read as being representative of the international community writ large, meaning that they would not have the same resounding impact.[94]

The claim that an internationalised tribunal would make a material contribution to domestic capacity building also appears to be overstated. Ukraine is already receiving an unprecedented level of international support in relation to its investigation and prosecution of other serious international crimes.[95] It is not a country in which the rule of law needs re-establishing: to the extent that there is a need to address outstanding deficiencies in the Ukrainian judicial system, EU membership already serves as a significant incentive, and it is difficult to see how international staff in a highly specialised tribunal would have any broad-based impact on issues such as corruption.

It has also been widely agreed that the tribunal statute should employ the international – rather than the Ukrainian – definition of the crime of aggression. Article 437 of Ukraine's Criminal Code differs from the definition of the crime under Article 8*bis*(1) of the Rome Statute[96] in that it defines the State act element of the crime by reference to the notions of aggressive war/armed conflict or aggressive military operations, and, more consequentially, does not limit perpetrators to persons in a position effectively to exercise control over or to direct the political or military action of a State.[97] With the exception of the US, it seems all members of the Core Group (and commentators) are strongly in favour of the use of the Article 8*bis* definition, partly to ensure that the internationally agreed definition is not undermined, but also because the 'manifest violation' threshold built into the definition

94 See also Grigaite-Daugirde, "The Lithuanian Case"; remarks of Anton Korynevych, Claus Kress and Carrie McDougall at Institute of International and European Affairs, *Ensuring Accountability*.

95 Detailing the overwhelming US support alone see U.S. Department of State, *Supporting Justice and Accountability in Ukraine*, Fact Sheet, 18 February 2003.

96 Article 8*bis* (1) provides: "For the purpose of this Statute, 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."

97 Article 437 provides: "1. Planning, preparation or waging of an aggressive war or armed conflict, or conspiring for any such purposes shall be punishable for a term of seven to twelve years. 2. Conducting an aggressive war or aggressive military operations, shall be punishable by imprisonment for a term of ten to fifteen years."

of the State act element of the crime, and the leadership qualifier, are seen as essential components of the modern definition of the crime of aggression. There is also no need for the proposed tribunal to have jurisdiction over any separate domestic offences given it is agreed that the tribunal would only have jurisdiction over the crime of aggression. The proposed subject matter jurisdiction of the tribunal thus further demonstrates that the rationale for the employment of the hybrid model is missing.

The G7 appears to agree that international elements are necessary for the proposed tribunal to be perceived as legitimate. The logical extension of this view is that the more international in character, the more legitimate the tribunal will be in the eyes of the international community.

Conclusion

As demonstrated by the foregoing, the arguments in favour of the internationalised model are far from compelling and there are a number of reasons to prefer an international model.

Indeed, it has been widely acknowledged *sotto voice* that the principal reason for the G7's support for a hybrid model is the fear that a GA-backed international tribunal could create a precedent that may in the future be used against G7 States' interests, given the P3's inability to control GA votes.[98]

In responding to this concern, Rebecca Hamilton has pointed out that an internationalised tribunal would in fact be more readily replicated than a GA-backed international tribunal.[99] This is no doubt true – but in my view it does not address the core of the G7's concerns, given an 'internationalised' tribunal established in a State hostile to the P3 might fairly readily be dismissed as an overtly political attempt at prosecution and is likely to represent only an embarrassment or minor inconvenience.

I would instead emphasise that the risk of the GA agreeing to establish an *ad hoc* international tribunal to prosecute the crime of aggression in the face of anything less than a full-scale invasion of another country with the overt objective of occupying and annexing its territory and annihilating its people, is slim. Specifically, the P3 and their allies have no reason to fear an international tribunal precedent so long as they are committed to ensuring

98 See Clancy, "The Divide Hardens"; Trahan, "Don't be Fooled".
99 Hamilton, "An Assessment of the United States".

that any use of force undertaken by them has a defensible legal basis – even if some States and scholars would maintain a different interpretation of the law. Such action would not meet the manifest threshold built into the definition of the crime of aggression[100] and, in those circumstances, a proposed tribunal would not command the support of a majority in the GA.

In this context, I think it is important to point out that States are self-harming their own fundamental interests by turning a blind eye to the consequences of double standards. Whether one believes it is justified or not, the undeniable fact is that the narrative that many western States apply a double standard when it comes to the use of force, and to international criminal justice, has taken a firm hold in many parts of the globe. Because of this, those States that played a key role in shaping the current international order, and which have benefited enormously from it, are losing their moral authority, and thus their ability to command support for the international rules-based order.

The surest way to address this is to demonstrate a willingness to hold oneself to the same standards as every other member of the international community. One hopes that the P3 and their closest allies will reach this conclusion soon enough, and that they will support Ukraine's call for an international tribunal – in addition to ratifying the Rome Statute and the aggression amendments, and supporting the removal of the restrictions on the ICC's jurisdiction over the crime of aggression.

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100 See further McDougall, *The Crime of Aggression*, 154-212.

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